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Case Number

In the Supreme Court of the United States

OCTOBER TERM, 1984

LAURIE R. MILLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Prior to and during her trial on criminal charges below, Petitioner sought to sever her trial from that of a codefendant because the codefendant and his attorney would be material witnesses in her defense. The motions were denied and during the joint trial the trial judge refused to allow the witnesses to testify. However, at the jury charge conference after the close of the evidence, the judge broached the subject of the severance. He advised that he had reconsidered Petitioner's need for the testimony, and indicated his belief that the severance should have been granted. The judge solicited a motion for mistrial from Petitioner's counsel, advising that he would grant it only if Petitioner waived her right against double jeopardy. Petitioner complied, but only after advising the judge that she felt she had no other choice.

This proceeding would present the question whether a defendant in such circumstances has retained primary control over the course to be followed within the meaning of *United States v. Dinitz*, 424 U.S. 600 (1976), such that her right not to be tried a second time has been waived.

II. In one of the counts against her, Petitioner was charged with forging a name to a charter agreement which was later attached as an exhibit to her codefendant's petition for remission of forfeiture of his sailboat. The petition was submitted to the United States Customs Service, which had seized the boat after its alleged use to transport marijuana. The testimony at trial demonstrated that Petitioner signed the agreement before the boat's discovery and seizure by Customs.

A defendant does not have to have knowledge of federal agency involvement in order to be convicted of making a false statement under 18 U.S.C. §1001. *United States v. Yermian*, _____ U.S. _____, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984). But this proceeding would present a question that was not addressed

in the *Yermian* opinion: whether a defendant can be convicted under the statute where the false statements forming the basis of the charge were made prior to any federal agency involvement.

PARTIES

All parties to this proceeding are named in the caption appearing on the cover of this petition.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Case Nos. 83-3185, 83-3319, is reported at _____ F.2d _____ (1984), and is included in the appendix.

JURISDICTION

The judgment sought to be reviewed was announced September 27, 1984. The court of appeals denied a timely motion for rehearing and suggestion for rehearing en banc on November 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section 1001 of Title 18, United States Code (1982), provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or documents knowing the same to contain any false, fictitious or fraudulent statement

or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 2 of the foregoing provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Petitioner, and others including August Carl Benz, were charged together in a two-count indictment in the United States District Court, Middle District of Florida. Count I charged the defendants with a conspiracy to import over 1,000 pounds of marijuana into the United States and to possess that marijuana with intent to distribute, in violation of 21 U.S.C. §§ 846 and 963. Count II charged Petitioner, Benz, and another of the defendants, with submitting a false document to the U.S. Customs Service in connection with Benz's attempt to recover from Customs the sailboat allegedly used to carry out the conspiracy charged in the first count, in violation of 18 U.S.C. §§ 1001 and 2 (1982).

After their codefendants fled, Petitioner and Benz were tried together before a jury. Prior to trial, Petitioner moved for a severance of trials, asserting her need to present the testimony of Benz and/or his attorney in her defense. The motion was denied. At various times during the ensuing joint trial, Petitioner unsuccessfully renewed her motions for severance. During the presentation of her defense, Petitioner attempted to call Benz as a witness in her behalf. Benz invoked his Fifth Amendment privilege, but advised the trial judge that he would testify if his pending motion for severance of counts were to be granted. (Benz desired to testify in his own behalf only as to Count II.)

The trial judge declined to grant Benz's motion, so he did not testify for Petitioner. Petitioner also tried to call Benz's attorney, but was precluded from doing so on Benz's objection.

After six days of trial, at the jury charge conference after the close of evidence, the trial judge announced that he had reconsidered Petitioner's need for the testimony of Benz or his attorney, and announced that he would entertain a motion for mistrial as to her if she would waive her right against double jeopardy. Petitioner complied, advising the judge that she felt she had no other choice. The judge then declared a mistrial.

When Petitioner's trial was rescheduled, she moved to dismiss the indictment, asserting that a second trial would violate the Fifth Amendment bar to double jeopardy. The motion was denied, and Petitioner immediately took an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit. After the appellate court denied Petitioner's motion for a stay of proceedings below, she was tried before a second jury and convicted of both counts. She took an appeal to the Eleventh Circuit [28 U.S.C. § 1291], which was consolidated with her previous one.

The basis for the charge against Petitioner in Count II of the indictment was that she had forged the signature on a charter agreement that was later attached as an exhibit to a petition for remission of forfeiture submitted to the U.S. Customs Service on Benz's behalf. Customs had seized Benz's sailboat after its alleged use to transport marijuana.

During her trial, Petitioner testified she had signed the charter agreement as a favor to Benz's secretary, who had told her that the original had been lost when a briefcase was stolen from her car. Petitioner testified that she believed the boat had in fact been chartered by the person whose name she signed to the agreement, and that she was unaware the agreement would later be attached to a petition for remission of forfeiture and

submitted to Customs. Her testimony, which was the only evidence in the record as to when the agreement was signed, demonstrated that she signed it prior to the boat's return from its alleged marijuana haul, and prior to its discovery and seizure by Customs.

On September 27, 1984, the court of appeals issued its opinion affirming Petitioner's convictions. Petitioner's timely motion for rehearing and suggestion for rehearing en banc were denied on November 6, 1984.

ARGUMENT

I.

A DEFENDANT'S MOTION FOR MISTRIAL SHOULD NOT WAIVE THE DOUBLE JEOPARDY BAR TO RETRIAL WHERE HE DID NOT HAVE PRIMARY CONTROL OVER THE COURSE OF THE PROCEEDING IN A MANNER CONSISTENT WITH THE DOUBLE JEOPARDY AND FAIR TRIAL PROTECTIONS, AND WHEN HIS AFFIRMATIVE ATTEMPTS TO PREVENT THE CIRCUMSTANCES GIVING RISE TO THE MISTRIAL WERE FRUSTRATED.

In its opinion, the court of appeals correctly observed that the threshold question presented by Petitioner's double jeopardy claim was whether she consented to the mistrial of her first trial. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). The court held that the mistrial was consensual, and that therefore the Double Jeopardy Clause did not bar Petitioner's retrial because there was no evidence of intentional provocation by the prosecutor or the trial judge. *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

But the court's ruling involved serious questions posed by Petitioner's circumstances, which were not present in *Dinitz* or *Kennedy*, and which call into question the adequancy of those decisions to afford defendants the protections of the Fifth and Sixth Amendments under circumstances such as Petitioner's.

In *Dinitz*, the Court pointed out that in assessing whether a mistrial was declared with the defendant's consent, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [prejudicial judicial or prosecutorial] error." *Dinitz*, 424 U.S. at 609. In a footnote to that passage, the Court noted that a defendant's ability to seek and obtain a mistrial if he wishes may actually serve "the protection against the burden of multiple prosecutions underlying the constitu-

tional prohibition against double jeopardy[.]" *Dinitz*, 424 U.S. at 609, n. 11. Indeed, earlier in the *Dinitz* opinion, the Court opined that

> [w]hen judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause — the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.
>
> *Dinitz*, 424 U.S. at 608.

Dinitz thus envisioned that a defendant's exercise of "primary control" must be under circumstances that in a practical sense allow him to choose a course that is consistent with the objectives underlying the double jeopardy protection. In the most common instances, as when evidence is improperly presented to the jury by a prosecutor's overzealous question or a witness's unresponsive answer, the defendant's choice is immediate and clear. He may elect to terminate the trial then and there, thus avoiding the "anxiety, expense, and delay occasioned by multiple prosecutions" which would ensue if the trial proceeded all the way to verdict and he then had to endure a lengthy appeal and possible retrial.

Petitioner's situation, however, was quite different. She did not have primary control over the course to be followed. The circumstances did not afford her a choice consistent with the objectives of the Double Jeopardy Clause.

Petitioner's need for the testimony of her codefendant or his attorney was foreseen by her prior to trial, and she appreciated the dilemma a joint trial would therefore present. She brought the problem to the attention of the trial judge and sought to

avoid it by moving for a severance. The motion was denied. At that point, Petitioner had no control over the course to be followed. From the standpoint of the Double Jeopardy Clause, her fate was sealed; the *only* course available to her was to submit to the embarrassment, expense, anxiety and ordeal of the trial. If convicted, she would have to start all over with a retrial if she were successful on appeal.

Those things were not spared her when—six days later, after all evidence had been presented and counsel were gathered for the jury charge conference—the trial judge broached the subject of Petitioner's need for the precluded testimony and solicited a motion for mistrial. At that point, Petitioner had no choice that was consistent with the interests served by the Double Jeopardy Clause. She had *already* suffered the burden of a six-day trial; had she proceeded to a guilty verdict in the tainted proceeding, her *best* hope (that being a reversal on appeal) was that she would have to endure the anxiety of yet another trial.

Petitioner's situation, inconsistent as it was with the objectives of the Double Jeopardy Clause and with the wisdom of *Dinitz*, was not of her making. Ironically, she had affirmatively attempted to prevent the situation giving rise to the mistrial by her pretrial motion for severance; could she not as easily have simply attempted to call the witnesses when her turn to present testimony arose? Unlike the choice with which Petitioner was confronted after six days of trial, her pretrial effort to prevent her trial from being tainted was consistent with the Double Jeopardy Clause's objectives.

Such circumstances were not contemplated in *Oregon v. Kennedy*, 456 U.S. 667 (1982), which assumed a defendant's voluntary motion for mistrial, and focused on the question whether the defendant was goaded into requesting it by intentionally provocative conduct. The debate in *Kennedy* was over what kind of circumstances would cause a defendant's motion for mistrial to be deemed involuntary for purposes of the Dou-

ble Jeopardy Clause. The majority opted for a test requiring intentionally provocative conduct, on the theory that such could be objectively discerned from the record.

Here, there was no bad faith on the part of the prosecutor or the trial judge. But Petitioner *had* tried to avoid the prejudicial situation prior to and throughout the trial, in a manner that was consistent with her right to be tried only once; had her efforts not been frustrated, the reason for the mistrial would not have arisen, and her right to a fair trial and her right to face only one jury would have been preserved.

The exception to the rule that a defendant's motion for mistrial removes the double jeopardy bar to retrial set forth in *Kennedy* was constructed to serve both the policies underlying the Double Jeopardy Clause, and the need for an objective standard by which double jeopardy claims could be assessed. Application of the double jeopardy bar in situations such as Petitioner's would also serve those purposes. The objectives of the Double Jeopardy Clause and of justice in general are well-served by a defendant's pretrial attempts to prevent prejudicial error from tainting the proceeding. Where those efforts are frustrated, a defendant should not be subjected to retrial when the very error she sought to prevent taints the proceeding. And, importantly in light of *Kennedy*, record documentation of such efforts by a defendant furnishes a standard of even greater objectivity than that of the prosecutor's intent, adopted by the *Kennedy* majority.

II.

A PERSON WHO MAKES A FALSE STATEMENT PRIOR TO THE INVOLVEMENT OF A FEDERAL AGENCY AND WITHOUT KNOWLEDGE THAT A FEDERAL AGENCY WOULD BECOME INVOLVED SHOULD NOT BE HELD TO HAVE VIOLATED 18 U.S.C. §§1001 and 2 (1982).

The court of appeals rejected Petitioner's argument that the

evidence was insufficient to convict her of Count II of the indictment because at the time she signed the charter agreement she had no knowledge that it would later be submitted to Customs. As the court pointed out, this Court recently resolved the conflict among the circuits over whether knowledge of federal involvement is a requisite element of the crime proscribed in 18 U.S.C. §1001. In *United States v. Yermian*, _____ U.S. _____, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), the Court held that such knowledge was not necessary to a conviction under the statute.

But neither *Yermian* nor the other case cited by the court of appeals, *United States v. Baker*, 626 F.2d 512 (5th Cir. 1980), involved a situation in which the false statement was made not only without knowledge of federal jurisdiction, but at a time when the federal agency was not involved. In both cases, the false statements were made when federal jurisdiction had already been implicated, albeit unbeknown to the defendants.

Here, though the court of appeals incorrectly observed that Petitioner signed the charter agreement after Customs seized Benz's boat, the evidence in the record was clear that she signed the agreement long before then. (The discrepancy was pointed out to the court of appeals in Petitioner's motion for rehearing, to no avail.)

As the *Baker* Court noted, federal jurisdiction is one of five necessary elements of the crime. 626 F.2d at 514. Thus, this case raises the important question whether a false statement that does not violate the statute when it is made can nevertheless *ex post facto* become a criminal act as a result of subsequent federal involvement brought about by the actions of others. The Petitioner submits it can not and, since the Government did not and could not prove a necessary element of the crime, the evidence was insufficient to support Petitioner's conviction under 18 USC §§1001 and 2 (1982).

CONCLUSION

This case involves questions which the Petitioner submits fall within the considerations described in the Court's Rule 17.1(c). Petitioner's double jeopardy claim presents an important question that has apparently not been settled by this Court. The court of appeals decided it in a way that departs from the notions underlying the "primary control" test set forth in this Court's *Dinitz* decision.

The other question presented should also be settled by this Court; the decision of the court of appeals allows otherwise non-violative conduct to be made criminal after-the-fact by circumstances that are unforeseen by the accused, uncontrollable by him, or unknown to him.

For the reasons described herein, Petitioner respectfully requests this Honorable Court to accept jurisdiction of this cause and grant plenary review.

Respectfully submitted,
LEVINE, FREEDMAN, HIRSCH & LEVINSON,
PROFESSIONAL ASSOCIATION

By:_____
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of this Petition and Appendix have been furnished by U.S. Mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to the Office of the United States Attorney, 500 Zack Street, Tampa, Florida 33602 this _____ day of January, 1985.

_____

Arnold D. Levine

APPENDIX A

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Order on Petition for Rehearing and Suggestion for Rehearing En Banc, United States vs. Miller, _____ F.2d _____ (11th Cir. Nos. 83-3185, 83-3319), November 6, 1984..... A-14

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LAURIE MILLER,
Defendant-Appellant.

United States Court of Appeals,
Eleventh Circuit.

Sept. 27, 1984.

Defendant was convicted before the United States District Court for the Middle District of Florida, George C. Carr, J., of conspiring to import marijuana and to possess marijuana with intent to distribute and of submitting false statement to Customs Service in connection with codefendant's attempt to recover from Customs sailing vessel used to carry out conspiracy, and she appealed. Appeal was consolidated with her interlocutory appeal from Court's prior denial of motion to dismiss indictment on double jeopardy grounds. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) absent evidence of bad faith or intentional provocation on part of trial judge, exception to rule that consent to mistrial operates as waiver of right to claim double jeopardy did not apply, and (2) evidence was sufficient to support defendant's conviction.

Affirmed.

1. Criminal Law 161

Double jeopardy clause is not absolute bar to successive trials. U.S.C.A. Const.Amend. 5.

2. Criminal Law 183

In context of retrial following declaration of mistrial, key question for double jeopardy purposes is whether mistrial was declared with defendant's consent. U.S.C.A. Const.Amend. 5.

3. Criminal Law 183

If mistrial is declared with defendant's consent, he is deemed to have waived any double jeopardy claim he might otherwise have, but if defendant wishes to proceed to verdict by jury empaneled to try him and court declares mistrial over his objection, double jeopardy clause will bar defendant's retrial unless manifest necessity required court to so act. U.S.C.A. Const.Amend. 5.

4. Criminal Law 183

Sole circumstance in which defendant's consent to mistrial does not operate as waiver of his right to claim double jeopardy is where prosecutor or judge intentionally provokes defendant to request mistrial. U.S.C.A. Const.Amend. 5.

5. Criminal Law 183

Absent evidence of bad faith or intentional provocation on part of trial judge, pretrial refusal to grant request for severance of parties would not warrant application of intentional provocation exception to rule that defendant's consent to mistrial operates as waiver of right to claim double jeopardy. U.S.C.A. Const.Amend. 5.

6. Criminal Law 183

Absent intentional judicial or prosecutorial provocation, defendant who obtains mistrial is deemed to have anticipated retrial. U.S.C.A. Const.Amend. 5.

7. Criminal Law 1144.13(3), 1159.2(7)

On consolidated interlocutory appeal from denial of motion to dismiss indictment on double jeopardy grounds and appeal from convictions, Court of Appeals reviewed defendant's claim that evidence was insufficient to support convictions by viewing evidence in light most favorable to jury verdicts and determining whether reasonable trier of fact could have found that evidence established guilt beyond reasonable doubt.

8. Conspiracy 28(3)

To convict defendant of conspiracy to import marijuana

and to possess marijuana with intent to distribute, jury had to find that conspiracy existed and that defendant knew of conspiracy and agreed to participate in it. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 1002(a), 1010, 1013, 21 U.S.C.A. §§ 841(a), 846, 952(a), 960, 963.

9. Conspiracy 40

"Mere presence" is not enough to support conspiracy conviction.

10. Conspiracy 47(12)

Evidence was sufficient to convict defendant of conspiring to import marijuana and to possess marijuana with intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a), 406, 1002(a), 1010, 1013; 21 U.S.C.A. §§ 841(a), 846, 952(a), 960, 963.

11. Customs Duties 134

Evidence that defendant forged name on false charter submitted to Customs Service after Customs had seized boat used to carry out conspiracy to import and possess marijuana with intent to distribute was sufficient to convict defendant for submitting false document to Customs Service in connection with attempt to recover such boat from Customs. 18 U.S.C.A. §§ 2, 1001.

12. Customs Duties 134

Asserted justification, that codefendant's secretary asked defendant to sign false boat charter form and that defendant signed false name merely to accommodate secretary, did not negate legal effect of defendant's conduct. 18 U.S.C.A. § 1001.

Appeals from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

Appellant Laurie Miller and August Carl Benz (and others who have skipped bail and are fugitives) were indicted, in two counts, in the Middle District of Florida for conspiring to import over 1,000 pounds of marijuana into the United States and to possess that marijuana with intent to distribute (count one)[1] and for submitting a false document to the U.S. Customs Service in connection with Benz' attempt to recover from Customs the sailing vessel used to carry out the conspiracy (count two).[2] Miller and Benz were tried together before a jury. In her defense, Miller attempted to call Benz' trial attorney as a witness for the announced limited purpose of showing that she had not knowingly submitted to Customs the false document described in count two of the indictment. The court, sustaining Benz' objection, refused to allow the attorney to testify, and Miller moved for a mistrial.

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1. Miller, Benz, and three others, Debra Engh, Ed Cowart, and Steven Maros, were charged in count one under 21 U.S.C. §§ 846, 963 (1982) with conspiring to violate 21 U.S.C. § 952(a), 960 (1982) (proscribing the importation of controlled substances, including marijuana) and 21 U.S.C. § 841(a) (1982) (proscribing the possession of controlled substances, including marijuana, with intent to distribute). Sections 846 and 963 contain identical language but deal with different subchapters of the drug law: section 846 refers to Subchapter I, Control and Enforcement; section 963 refers to Subchapter II, Import and Export. These two sections provide:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

---

2. Miller, Benz, and one of the other conspirators indicted in count one, Debra Engh, were charged in count two under 18 U.S.C. §§ 1001, 2 (1982). Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States [e.g., U.S. Customs Service] knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The court granted her motion.[3] After the court scheduled her case for retrial, Miller moved to dismiss the indictment with prejudice, claiming former jeopardy.[4] Miller's motion was denied, her case proceeded to trial, and she was convicted on both counts. In these consolidated appeals,[5] Miller presents alternative claims: that her retrial was barred by the double jeopardy clause of the fifth amendment and that the evidence was insufficient to support her convictions. We affirm.

I.

The facts established by the prosecution in this case have been set out in *United States v. Benz*, 740 F.2d 903 at 906, (11th Cir.1984). We restate them here, in the light most favorable to the government,[6] giving emphasis to those facts relevant to Miller's convictions.

In September 1981, Laurie Miller, a former employee of the U.S. Customs Service, and her boyfriend, Ed Cowart, were living together in a house in St. Petersburg, Florida. They knew most of the people who ran a certain marina in St. Petersburg and did business there. One day, Cowart and August Carl Benz, who chartered boats at the marina, approached John Hunt, a sailmaker who had done work for Benz, about the possibility of smuggling a load of marijuana into the United States aboard Benz' forty-eight foot sailboat, the *Carpe Diem*. Hunt was interested, and shortly thereafter the three men, joined by Miller and Steve Maros (the boyfriend of Benz' secretary, Debra Engh), met at the Miller-Cowart residence and arrived at a plan. Hunt,

3. The trial as to Benz continued, and the jury found him guilty as charged. *See United States v. Benz*, 740 F.2d 903 at 909 (11th Cir. 1984).

4. Miller claimed that the double jeopardy clause of the fifth amendment precluded her retrial. That clause provides, in pertinent part: "[n]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const.Amend. V.

5. Appeal No. 83-3185 is Miller's interlocutory appeal from the district court's denial of her motion to dismiss the indictment on double jeopardy grounds. Appeal No. 83-3319 is Miller's appeal from her convictions.

6. See infra part II B. of the text.

as captain, and Douglas Lee, as crew member, would sail the *Carpe Diem* to the Cayman Islands; there Cowart would give them their final instructions and, with Maros aboard, they would sail to Aruba, in the Lesser Antilles, to pick up the marijuana and return to Florida. To minimize the possibility that Customs agents might foil the operation, Miller briefed Hunt on their modus operandi and showed him photographs of several agents stationed along the Florida Gulf coast whom he might encounter.

The smuggling operation began in late September. Hunt and Lee, with the aid of Miller and Cowart who helped them outfit the *Carpe Diem* for the voyage, sailed the vessel to the Cayman Islands and there rendezvoused with Cowart and Maros, as planned. (Cowart, traveling under a false passport, had flown to the Islands.) Cowart instructed Hunt on how to proceed to Aruba and contact the marijuana source, a trawler off the Aruba coast. Hunt, following his instructions, took on Maros as an additional crew member and sailed the *Carpe Diem* to Aruba. He located the trawler, picked up 8,000 to 10,000 pounds of baled marijuana, and returned to a predesignated point off the Florida coast where he rendezvoused with Cowart, who was aboard a power boat, the *Suzi Q*. Hunt and Cowart then took the two vessels to Cedar Key, on the Florida Gulf Coast, where they and their crews offloaded the marijuana. Thereafter, Hunt and Maros sailed the *Carpe Diem* to a point off Hernando Beach, Florida and abandoned her. Cowart meanwhile abandoned the *Suzi Q*. Hunt and Maros then called Miller at her home in St. Petersburg and asked her to pick them up. She did so, and enroute to St. Petersburg they briefed her on what had transpired.

Customs officers subsequently found the *Carpe Diem* and the *Suzi Q* lying at anchor off the Florida coast and covered with marijuana residue. They seized the boats.[7] Benz, in an effort to set aside the forfeiture of his vessel, the *Carpe Diem*, presented, through his attorney, Anthony Gonzalez, a Petition in Remission or Mitigation of Forfeiture to Customs. Benz attached to his petition a charter agreement purporting to show that he had had the boat under charter to an Edgar Picado since September 1981.

7. Customs seized the vessels under the authority conferred by 19 U.S.C. § 1595a (1982).

The charter agreement bore the signature "Edgar Picado," which Miller had signed.

Customs managed to learn that Hunt had captained the *Carpe Diem* in a marijuana smuggling venture, arrested him, and persuaded him to testify against his confederates. On September 16, 1982, the grand jury returned a two-count indictment, charging Miller, Benz, and the others, as we have indicated in the margin. *See supra* notes 1 and 2. Only Miller and Benz made themselves available for trial; their coindictees became fugitives. Prior to trial, Miller moved for a severance of parties on the ground that she would need to call Benz' attorney, Anthony Gonzalez, as a material witness; she represented that Gonzalez would testify that she had no knowledge that Benz would present to Customs the charter agreement she had signed as Edgar Picado. The court denied her motion.

At trial, the government called Hunt, who testified to the above events. Crew member Douglas Lee confirmed his story. The Customs agents testified to their discovery of the *Carpe Diem* and the *Suzi Q* and introduced the marijuana residue they had scraped off the two boats. Finally, the government established a fact that Miller does not contest, that she had written the signature "Edgar Picado" on the charter agreement Benz had submitted to Customs.

Miller's response to the government's case was to deny any knowledge of the smuggling conspiracy and of the illegal use Benz made of her Edgar Picado signature. Taking the witness stand, Miller admitted that Cowart had been her boyfriend and that she had known all of the conspirators socially; she insisted, however, that this was the extent of her relationship with them. She admitted signing Picado's name on the charter agreement, but stated that she had done so merely to accommodate Debra Engh, Benz' secretary. Debra Engh told her that the original of the document had been in a briefcase stolen from Engh's car and asked her as a favor to sign Picado's name on a replacement copy. Miller said that she signed Picado's name and saw no harm in doing it, because she actually thought, from some statements Cowart had made to her, that Picado had the boat. She had no idea, she said, that anyone would present the document to Customs.

To buttress this point, Miller endeavored to call to the stand Benz' attorney, Anthony Gonzalez, who was acting as Benz' lead trial counsel. Benz objected, and the court precluded counsel from testifying. Miller then moved for a severance. The court advised her that it would only abort her trial if she formally waived any right she might have to claim later that a retrial would subject her to double jeopardy. Miller signed a waiver form, purportedly relinquishing such a right, on advice of counsel, so that on retrial she could have the benefit of Gonzalez' testimony. Thereupon, the court declared a mistrial of Miller's case.

After the district court scheduled her case for retrial, Miller moved to dismiss the indictment, claiming that a retrial would constitute double jeopardy. The court denied her motion, and she immediately took an interlocutory appeal.[8]

On retrial, the government presented essentially the same evidence as at the earlier trial. Miller's defense did not change; she testified again that she had not known of any wrongdoing and had signed the name Edgar Picado merely to accommodate Debra Engh. Miller called Benz' attorney, Gonzalez, to bolster her claim that she did not know that the document would be presented to Customs as part of Benz' Petition for Remission or Mitigation of Forfeiture. He testified that he had prepared the petition and that the charter agreement, annexed to the petition, had previously been signed out of his presence, presumably by Edgar Picado. The jury found Miller guilty as charged on both counts, and, following the imposition of sentence, she appealed.

In these consolidated appeals, Miller presents alternative claims, each of which, if valid, would require us to acquit her on both counts. She challenges the trial court's denial of her double jeopardy motion and the sufficiency of the evidence to support her convictions.

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8. *See supra* n. 5. We declined to stay further proceedings in the district court pending our resolution of the interlocutory appeal.

II.

A.

In determining whether Miller's retrial was barred by the double jeopardy clause, we face two issues: whether Miller was placed in jeopardy twice within the meaning of the double jeopardy clause and, if so, whether, by executing the purported written waiver as a condition precedent to the court's termination of her first trial, she somehow relinquished her double jeopardy claim. Since we resolve the first issue against Miller, we need not decide the legal effect of the written waiver.

[1-4] The double jeopardy clause of the fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause, however, is not an absolute bar to successive trials. *Justices of Boston Municipal Court v. Lydon*, _____ U.S. _____, 104 S.Ct. 1805, 1812, 80 L.Ed.2d 311 (1984). In the context we face here, retrial following the declaration of a mistrial, the key question for double jeopardy purposes is whether the mistrial was declared with the defendant's consent. *United States v. Dinitz*, 424 U.S. 600, 608, 96 S.Ct. 1075, 1080, 47 L.Ed.2d 267 (1976). If a mistrial is declared with the defendant's consent, he is deemed to have waived any double jeopardy claim he might otherwise have. If, on the other hand, the defendant wishes to proceed to a verdict by the jury empaneled to try him and the court declares a mistrial over his objection, the double jeopardy clause will bar the defendant's retrial unless manifest necessity required the court so to act. *Id. United States v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824). The only circumstance in which the defendant's consent to a mistrial does not operate as a waiver of his right to claim double jeopardy is where the prosecutor or the judge *intentionally provokes* the defendant to request the mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416 (1982).

In this case, the defendant consented to the declaration of a mistrial. This becomes clear when one examines what occurred after Miller called Benz' trial attorney, Anthony Gonzalez, to the stand as the final witness for her defense. The judge immediately excused the jury, so he could consider counsel's argument on whether he should allow Gonzalez to testify over Benz'

objection. Miller's counsel argued strenuously that either the court should allow Gonzalez to testify or it should sever Miller's case. The court informed Miller's counsel that what he was asking for was not a "severance" but a mistrial of his client's case, and that to discontinue the proceedings as to Miller without formally declaring a mistrial might create a double jeopardy problem. Miller's attorney responded that he would be glad to move for a mistrial if that is what it would take to terminate Miller's trial. The judge ended the colloquy by stating that he would not grant a mistrial unless Miller moved for one *and* signed a waiver of any double jeopardy objection she might have to a mistrial.

After a brief recess, Miller's counsel, in the presence of his client, moved for a mistrial, stating that he was doing so because he was "faced with the choice between waiving double jeopardy or calling Mr. Gonzalez and claiming [Miller's] Sixth Amendment privilege so to do, [and had] no alternative but to recommend to [my] client that she waive the double jeopardy claim in order to avail herself of her Sixth Amendment right." Miller then announced that she concurred in her lawyer's recommendation, and the court declared a mistrial.

Counsel now contends that his client did not consent to the mistrial. He does not persuade us. Counsel never indicated that even without Gonzalez' testimony Miller wished to proceed to a verdict at the hands of the jury empaneled to try the case. Rather, as the record plainly shows, after wrestling with the problem of whether to proceed to a verdict without Gonzalez' testimony or to try the case over with his testimony, he opted for the latter course and moved for a mistrial.

[5] Counsel argues that Miller's decision to request a mistrial was "provoked" by the trial judge's blatantly erroneous refusal, prior to trial, to grant her request for a severance of parties and that the narrow exception set forth in *Kennedy, supra,* should apply. We find no evidence of bad faith or intentional provocation on the part of the trial judge in this case;[9] accor-

9. Though appellant has not assigned as independent reversible error the district court's pretrial ruling denying her motion to sever the parties, she implicitly attacks that ruling in the context of her double jeopardy claim. We therefore have examined the pretrial denial of severance and find it to have been well within the court's discretion. Appellant wanted the severance so that Gonzalez could testify that she did not know that Benz would submit the false charter agreement to Customs. The district court apparently was not impressed with her proffer, and, as we disclose in the text, the court's impression proved correct: Gonzalez was unable to say anything regarding appellant's activities or her knowledge.

dingly, the *Kennedy* exception has no application.

[6] In sum, Miller was faced with a trial strategy decision a defendant often encounters after prejudicial error has allegedly occurred, whether to move for a mistrial or to proceed on to a verdict in the hope of obtaining an acquittal. Absent intentional judicial or prosecutorial provocation, a defendant who obtains a mistrial is deemed to have anticipated a retrial.

B.

[7] We review Miller's claim that the evidence was insufficient to support her convictions by viewing the evidence in the light most favorable to the jury verdicts and determining whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc) *aff'd on other grounds*, _____ U.S. _____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt...." *Id.* The evidence in this case, assessed under this standard, was certainly sufficient to support Miller's conviction on both counts.

[8-10] To convict Miller of conspiracy, the jury had to find that a conspiracy existed and that Miller knew of the conspiracy and agreed to participate in it. *United States v. Marszalkowski*, 669 F.2d 655, 661 (11th Cir.), *cert. denied sub nom.* 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 167 (1982). While, as Miller correctly points out, "mere presence" is not enough to support a conspiracy conviction, the testimony here showed her to be more than simply present when the conspirators happened to be together in pursuance of their smuggling plan. Miller played a vital role in the operation. Most importantly, she contributed her considerable knowledge of Customs' investigatory techniques and briefed Hunt on how to avoid detection, showing him photographs of several Customs agents who might cross his path. Thereafter, she and her boyfriend, Cowart, assisted Hunt and Lee in preparing the *Carpe Diem* for its long voyage through the Caribbean Sea. When Cowart flew to the Cayman Islands to give Hunt his final instructions, she accompanied him, renting the hotel room where they stayed and the car they used to travel about. She also knew that Cowart had traveled to the

Islands under a false passport, one that bore his photograph but a fictitious name. Finally, Miller was the one Hunt and Maros called to pick them up after they abandoned the *Carpe Diem* off Hernando Beach and in whom they confided the details of the offloading they had just accomplished. Certainly the jury was entitled to conclude from Miller's activities that Miller was a knowing and willing participant in the marijuana scheme.

[11] The evidence was fully sufficient for the jury to convict Miller on the second count as well. She forged the name Edgar Picado to the false charter Benz submitted to Customs, and she did so after Customs had seized the *Carpe Diem*. It was permissible for the jury to infer that this knowledgeable former Customs employee knew precisely what use Benz would make of the document; he would submit it to Customs so he could recover his boat.

[12] The jury, however, was not even required to make such an inference to find Miller guilty on the second count. The government was not required to prove that Miller knew the false document would be submitted to Customs; she subjected herself to liability under 18 U.S.C. § 1001 (1982) when she knowingly forged the name Edgar Picado. *See United States v. Yermian*, _____ U.S. _____, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984); *United States v. Baker*, 626 F.2d 512 (5th Cir.1980). In her own testimony she admitted the conduct making out a section 1001 offense. The justification she offered, that Debra Engh asked her to sign the form and that she did so merely to accommodate Engh, did not negate the legal effect of her conduct.

AFFIRMED.

September 27, 1984

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 83-3185 UNITED STATES OF AMERICA v.
LAURIE MILLER
83-3319

Enclosed is a copy of the court's decision this day entered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., and Circuit Rules 28, 26 and 27 govern costs, petitions for rehearing and mandates, respectively. *To be timely, a petition for rehearing or a suggestion of en banc consideration must be filed in the clerk's office within 20 days from this date. Placing the petition in the mail on the 20th day will not suffice.*

Circuit Rule 27 provides that, "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. 41 shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court, or otherwise sets forth good cause for a stay."

If you are court appointed pursuant to the Criminal Justice Act, your attention is called to Addendum Four to the Circuit Rules, section (e)(4) which provides: "In the event of affirmance or other decision adverse to the party represented appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court. Counsel shall file such petition if requested to do so by the party in writing."

Very truly yours,
SPENCER D. MERCER, Clerk
By Renee Norris
Deputy Clerk

Enc.

cc: Stevan T. Northcutt and
Rick B. Levinson
Lee W. Atkinson and
Karla R. Spaulding

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-3185
83-3319

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LAURIE MILLER,
Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion September 27, 1984, 11 Cir., 198__, ____F.2d____).
(Nov. 6, 1984)

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

PER CURIAM:

( ) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Gerald B. Tjoflat
United States Circuit Judge

REHG-6
(Rev. 6/82)